

DAVID L. HENKIN #6876
EARTHJUSTICE
850 Richards Street, Suite 400
Honolulu, Hawai‘i 96813
Telephone No.: (808) 599-2436
Fax No.: (808) 521-6841
Email: dhenkin@earthjustice.org

Attorney for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF HAWAI‘I

HUI HO‘OMALU I KA ‘ĀINA;)	Civil No. 17-00423
CONSERVATION COUNCIL FOR)	
HAWAI‘I; and CENTER FOR)	COMPLAINT FOR DECLARATORY
BIOLOGICAL DIVERSITY,)	AND INJUNCTIVE RELIEF
)	
Plaintiffs,)	
)	
v.)	
)	
HAWAI‘I DEPARTMENT OF)	
TRANSPORTATION,)	
)	
Defendant.)	
)	
)	

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs Hui Ho‘omalū i Ka ‘Āina, Conservation Council for Hawai‘i and the Center for Biological Diversity (hereinafter referred to collectively as “Plaintiffs”) complain of defendant Hawai‘i Department of Transportation (“HDOT”) as follows:

INTRODUCTION

1. Attraction to bright lights is a major threat to the continued survival and recovery of the Newell’s shearwater (*Puffinus auricularis newelli*), the Hawaiian petrel (*Pterodroma sandwichensis*) and the Hawai‘i population of Band-rumped Storm-petrels (*Oceanodroma castro*) (collectively, “imperiled seabirds”). These seabirds are native to the Hawaiian Islands and protected pursuant to the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531 et seq. The Newell’s shearwater was listed as threatened in 1975, the Hawaiian petrel was listed as endangered in 1967, and the Hawaiian population of Band-rumped Storm-Petrels was listed as endangered in 2016.

2. During the fledging season (from late September to early December), imperiled seabirds heading to sea are drawn to artificial lights, circling them until they fall to the ground from exhaustion or strike human-made structures. Even if uninjured, grounded birds may be unable to take off again and are vulnerable to predation, vehicle collisions, starvation, dehydration and poaching. Adult birds are also attracted to lights and suffer injury and death.

3. In the past three decades, tens of thousands of shearwaters and hundreds of petrels have been grounded by bright lights and recovered by the Save Our Shearwaters (“SOS”) program (a program on Kaua‘i that provides locations for the public to turn in downed seabirds for release). Due in large measure to the harm resulting from light attraction, the Newell’s shearwater population on Kaua‘i (the center of abundance of the species) is crashing, with an estimated decline of ninety-four percent (94%) in only twenty years (1993-2013). The Hawaiian petrel population on Kaua‘i is also in sharp decline, with an estimated reduction of seventy-four percent (74%) over the same time period. While probably once common on all the main Hawaiian Islands, the Band-rumped Storm-petrel on Kaua‘i (which likely has the largest population remaining in the state) now numbers only an estimated 171 to 221 breeding pairs.

4. While there are other sources of bright light, Defendant’s airport and harbor facilities on Kaua‘i, Maui and Lāna‘i are among the largest documented sources of seabird take from light attraction in the state. Plaintiffs bring this action to protect these critically imperiled species by compelling Defendant’s compliance with its mandatory duties under the ESA. Specifically, as described more fully herein, Plaintiffs seek a declaration that, in the absence of a lawful incidental take permit, Defendants’ activities at its facilities violate the ESA’s prohibition on unpermitted “take” of federally listed species. Plaintiffs also seek appropriate

injunctive relief to protect Newell's shearwaters, Hawaiian petrels and Band-rumped Storm-petrels from further harm from Defendant's illegal activities.

JURISDICTION AND VENUE

5. The Court has subject matter jurisdiction over the claims for relief in this action pursuant to 28 U.S.C. § 1331 (action arising under the laws of the United States); 16 U.S.C. § 1540(c) (action arising under the ESA); 16 U.S.C. § 1540(g) (citizen suit provision of the ESA); and 28 U.S.C. §§ 2201-2202 (power to issue declaratory judgments in cases of actual controversy).

6. On June 15, 2017, Plaintiffs served Defendant, as well as the Secretary of the Interior, with notice of the violations of law alleged herein, as required by ESA section 11(g)(2)(A), 16 U.S.C. § 1540(g)(2)(A).

7. Plaintiffs have formally demanded that Defendant bring its operations into compliance with the ESA, but Defendant has failed and refused, and continues to fail and refuse, to do so. An actual controversy therefore exists between the parties within the meaning of 28 U.S.C. § 2201 (declaratory judgments).

8. Venue lies properly in this judicial district by virtue of 16 U.S.C. § 1540(g)(3)(A) and 28 U.S.C. § 1391(b) and (c) because the violations are occurring here, the cause of action arises here, real property involved in the action is situated here, and Defendant resides here.

PARTIES

9. Plaintiff Hui Ho‘omaluku i Ka ‘Āina (“the Hui”) is a “taro roots” community-based organization founded by cultural practitioners in 1983 to restore, protect and preserve Kaua‘i’s natural and cultural resources. Members of the Hui include Native Hawaiian practitioners, community leaders, educators and other Kaua‘i residents who are actively involved in efforts to protect Kaua‘i’s unique biological and cultural treasures – including the Newell’s shearwater, Hawaiian petrel and Band-rumped Storm-petrel – for future generations.

10. Members of the Hui include Native Hawaiian fishermen who seek to perpetuate traditional fishing practices that rely on Newell’s shearwaters, Hawaiian petrels and Band-rumped Storm-petrels to locate schools of fish. Members also observe imperiled seabird behavior, which provides important information about imminent changes in the weather. The Hui’s members also participate in efforts to rehabilitate shearwaters and petrels that have been retrieved by the SOS program and to educate Kaua‘i’s school children regarding the birds’ cultural and biological significance. Moreover, the Hui’s members regularly observe and study or seek to observe and study these species for recreational, aesthetic and scientific purposes. To protect these cultural, subsistence, educational, recreational, aesthetic and scientific interests, Hui Ho‘omaluku i Ka ‘Āina brings this action on behalf of itself and its adversely affected members.

11. Plaintiff Conservation Council for Hawai‘i (“CCH”) is a non-profit citizens’ organization based in Hawai‘i with approximately 5,000 members in Hawai‘i, the United States mainland and foreign countries. CCH is the Hawai‘i affiliate of the National Wildlife Federation, a non-profit membership organization with over 5.8 million members and supporters nationwide.

12. CCH’s mission is to protect native Hawaiian species, including threatened and endangered species, and to restore native Hawaiian ecosystems for future generations. In this capacity, CCH and its members frequently submit testimony to the Hawai‘i State Legislature on various bills relating to the protection of the environment, testify before administrative agencies on proposed regulations relating to species conservation, communicate with Hawai‘i’s congressional delegation and staff, review and comment on environmental impact statements, support scientific studies and research, engage in field work to survey Hawai‘i’s natural resources, participate in service projects to protect native species and ecosystems, prepare educational materials, including an annual wildlife poster featuring native Hawaiian flora and fauna, and publish a periodic newsletter (Kōlea, News from the Conservation Council for Hawai‘i) discussing Hawaiian environmental issues. The group’s 2013 newsletter describes the observation of Newell’s shearwaters and Band-rumped Storm-petrels as “feel[ing] the pulse of Hawai‘i.” The group’s 2010 wildlife poster, which CCH distributes free of charge

to every public, charter, private and Native Hawaiian Language Immersion school in Hawai‘i, features the Newell’s shearwater.

13. With respect to Hawai‘i’s rare and endangered species, CCH and its members have worked to establish sanctuaries on each of the main Hawaiian Islands and have testified before the Hawai‘i Natural Area Reserves System (“NARS”) Commission for the expansion of these areas. CCH was involved in the creation of two NARS that protect important nesting and breeding habitat for the imperiled seabirds: Hono o Nā Pali on Kaua‘i and Nakula on Maui. CCH also regularly submits comments to the Department of Land and Natural Resources (“DLNR”) on the size of NARS areas and the management of these areas. CCH and its members have regularly testified to the Hawai‘i State Legislature in an effort to secure adequate, permanent funding for the NARS.

14. CCH and its members have advocated for increased efforts to remove and exclude feral sheep, goats, deer and pigs from state lands that are biologically-important to the imperiled seabirds, as feral ungulates eat seabird eggs and chicks and destroy the native vegetation the imperiled seabirds need to establish their nesting colonies. CCH and its members also have advocated for increased efforts to remove alien vegetation that endangers native Hawaiian ecosystems that provide vital habitat for the imperiled seabirds.

15. CCH conducts educational programs about the imperiled seabirds. As part of their Manu Kai (Seabird) Campaign, CCH educates children about Hawai‘i’s seabirds – including the imperiled seabirds – and the many threats that they face.

16. CCH members include wildlife biologists, Native Hawaiian practitioners, farmers, fishers, hunters, educators, artists, community leaders and others who study and enjoy native Hawaiian birdlife, including the Newell’s shearwater, Hawaiian petrel and Band-rumped Storm-petrel. CCH members who live on the mainland visit the islands to observe and enjoy Hawai‘i’s native wildlife, including the imperiled seabirds. CCH brings this action on behalf of itself and its adversely affected members and staff.

17. Plaintiff Center for Biological Diversity (the “Center”) is a non-profit corporation dedicated to preserving, protecting and restoring biodiversity, native species, ecosystems, and public lands. The Center has approximately 1.3 million members and online activists, many of whom reside in the state of Hawai‘i, and maintains offices throughout the western United States. The Center’s members and staff regularly spend time on Kaua‘i, Maui and Lāna‘i for seabird observation, research, aesthetic enjoyment and other recreational, scientific and educational activities. The Center’s members and staff have researched, studied, visited, observed or attempted to observe, photographed or attempted to photograph, and

sought protection for Newell's shearwaters, Hawaiian petrels and Band-rumped Storm-petrels on Kaua'i, Maui and Lāna'i. The Center's members and staff intend to continue to research, study, visit, observe, photograph and seek protection for these species in the future. The Center's members and staff derive scientific, recreational, conservation and aesthetic benefits from the existence of these animals in the wild. The Center brings this action on behalf of itself and its adversely affected members and staff.

18. To protect their interests in the imperiled seabirds, all three plaintiff groups filed lawsuits in 2010 to protect these species from death and injury associated with the activities of the Kaua'i Island Utility Cooperative ("KIUC") and the St. Regis Princeville Resort, including, but not limited to, harm associated with attraction to bright lights at facilities owned and operated by those defendants. Plaintiffs' lawsuit against KIUC resulted in KIUC securing incidental take permit coverage for its harmful activities, while Plaintiffs' lawsuit against St. Regis culminated in a settlement pursuant to which the resort implemented measures to reduce seabird attraction, committed to secure incidental take permit coverage, and has made monthly contributions to fund projects selected by Plaintiffs that benefit the imperiled seabirds.

19. The above-described cultural, aesthetic, conservation, recreational, subsistence, scientific and educational interests of the three plaintiff groups and

their respective members have been, are being, and, unless the relief prayed herein is granted, will continue to be adversely affected and irreparably injured by the Defendant's continued refusal to comply with its obligations under the ESA, as is more fully set forth below. The individual interests of the Plaintiffs' members, as well as Plaintiffs' organizational interests, are thus directly and adversely affected by Defendant's unlawful actions.

20. Defendant HDOT is an agency of the State of Hawai'i that is tasked with the establishment, maintenance and operation of transportation facilities of the State, including, but not limited to, airports and harbors on Kaua'i, Maui and Lāna'i.

LEGAL FRAMEWORK

21. "[T]he Endangered Species Act of 1973 represented the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." Tennessee Valley Authority v. Hill, 437 U.S. 153, 180 (1978). In furtherance of Congress's goal to conserve species, the ESA generally prohibits the "take" of any species listed as endangered or threatened. 16 U.S.C. § 1538(a)(1)(B). By regulation, the U.S. Fish and Wildlife Service – which administers the ESA with respect to terrestrial species, including the imperiled seabirds – has extended the prohibition on take to threatened species, including the Newell's shearwater. 16 U.S.C. § 1533(d); 50 C.F.R. §§ 17.21, 17.31, 402.01(b).

22. The ESA's prohibition on "take" includes actions that "harass," "harm" and "kill" protected species. 16 U.S.C. § 1532(19). The ESA's regulations define "harass" as "an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering." 50 C.F.R. § 17.3. "Harm" is defined as "an act which actually kills or injures wildlife." Id.

23. To comply with the ESA, Defendant may not "take" any threatened Newell's shearwater, endangered Hawaiian petrel or endangered Band-rumped Storm-petrel in the course of its operations unless Defendant first obtains and complies with the terms of an incidental take permit in accordance with ESA section 10(a), 16 U.S.C. § 1539(a).

24. The U.S. Fish and Wildlife Service may not issue an incidental take permit unless it first concludes that a permit applicant's activities will not "appreciably reduce the likelihood of the survival and recovery of [any endangered or threatened] species in the wild." 16 U.S.C. § 1539(a)(2)(B)(iv). The ESA further conditions the issuance of an incidental take permit on the applicant developing and committing to implement a habitat conservation plan ("HCP") that, among other things, minimizes and mitigates the impacts of any incidental take of

endangered and threatened species to the maximum extent practicable. Id. § 1539(a)(2)(A)(ii), (B)(ii).

BACKGROUND FACTS

Newell's Shearwaters

25. The Newell's shearwater is endemic to Hawai'i (i.e., it is found in Hawai'i and nowhere else on Earth). It is a medium-sized seabird, 12 to 14 inches in length, with a wingspan of 30 to 35 inches. It has a glossy black top and a white underside, with small white patches observable on the side of the rump in flight.

26. Newell's shearwaters forage over deep water, generally hundreds of kilometers out to sea, feeding by diving several meters below the ocean's surface to retrieve squid and fish.

27. Newell's shearwater colonies are found at high elevations inland, with nests often located under dense vegetation in open native forest dominated by 'ōhia, with a dense understory of uluhe fern.

28. Compared to most birds, but typical of its family, the Newell's shearwater has a low rate of reproduction. First breeding does not occur until approximately six years of age, and breeding pairs produce only one egg per year. Pairs may or may not breed every year.

29. The Newell's shearwater's breeding season begins in April, when birds return from foraging at sea to previously used nest sites or to prospect for

new sites in the case of first-time breeders. Egg-laying begins in the first two weeks of June and likely continues through the early part of July. The single egg is laid at the end of a long burrow, and one adult bird remains on the egg while the second adult goes to sea to feed. The chick growth period lasts approximately ninety days, and most fledging takes place in October and November.

30. Once the chick has hatched and is large enough to withstand the cold temperatures of the mountains, both parents will go to sea to provide the growing chick with a supply of food.

31. Newell's shearwaters arrive and leave their burrows during darkness, and the birds are rarely seen near land during daylight hours.

32. By far the greatest number of Newell's shearwater colonies and individuals are located on Kaua'i. During the early 1990's, the estimated Newell's shearwater population on Kaua'i was approximately 65,000 birds, out of a total year-round, at-sea population in the Hawaiian Islands of approximately 84,000 birds.

33. Recent studies indicate that, between 1993 and 2013, the Newell's shearwater population on Kaua'i declined by approximately ninety-four percent (94%).

34. Attraction to bright lights is one of the leading causes of injury and death to Newell's shearwaters. The vast majority of Newell's shearwaters that fall

victim to take from bright lights are hatch-year birds, but adult Newell's shearwaters are also subject to take from light attraction. When light attraction takes an adult Newell's shearwater, any chick that is still in the burrow, depending on the adult for food, also likely perishes.

Hawaiian Petrels

35. The Hawaiian petrel is an endemic Hawaiian seabird that forages widely across the central, northern and eastern Pacific Ocean for squid, fish, and crustaceans. This bird, similar in size to the Newell's shearwater, has a dark grey head, wings and tail, and a white forehead and stomach. Satellite-tagged birds have been tracked traveling more than 10,000 kilometers on a single foraging trip to and from their breeding colonies in the main Hawaiian Islands.

36. Hawaiian petrels have a low reproductive rate. They do not first breed until five to six years of age and may not breed every year once mature.

37. Known Hawaiian petrel breeding areas on Kaua'i are within interior valleys and uplands, where the birds excavate burrows beneath dense vegetation along valley headwalls, favoring steep slopes covered with uluhe fern. Hawaiian petrels have other breeding colonies on Maui and Lāna'i, and smaller colonies on Hawai'i Island. On Hawai'i Island and Maui, where the soil is dry and vegetation is scarce, Hawaiian petrels nest in cavities in the volcanic terrain, such as cracked lava tubes and crevices.

38. Hawaiian petrels begin arriving on breeding grounds and pairing in mid-February. Each pair produces only one egg per year, and egg-laying generally occurs in May and June.

39. Hawaiian petrel chicks hatch in July and August. Male and female parents share in the feeding of their chicks. After a chick hatches, its parents briefly stay and protect the chick before beginning a routine of extended ocean foraging. The parents will then abandon their young, around September or October of each year, and leave the nesting colony until the next season.

40. Fledging begins in late September, and, by December, adult and successful fledging birds have departed the Hawaiian Islands. Once the chicks leave, they will not return to land for several years, when they return to prospect for nests.

41. The Hawaiian petrels that are attracted to lights tend to be adult birds, and their chicks are likely to die when a parent downed by bright lights is unable to continue caring for its young.

42. The number of Hawaiian petrels on Kaua'i was estimated at approximately 5,000 pairs in the mid-1990's, but that number has declined by an estimated seventy-four percent (74%) in the years since. There are only an estimated 450 to 600 breeding pairs of Hawaiian petrels on Maui.

Band-rumped Storm-petrels

43. The Band-Rumped Storm-petrel is smaller than the Newell's shearwater at 7.5 to 9 inches in length, with a wingspan of 18 inches. The Band-rumped Storm-petrel is black and brown with a slightly forked tail, pale wing bars and a clear, curved white band across the rump.

44. Band-rumped Storm-petrels forage widely across the Pacific Ocean for squid, fish and crustaceans.

45. Band-rumped Storm-petrels breed on Kaua'i in steep valleys vegetated with shrubs and grasses at elevations around 1,950 feet. On Maui and Hawai'i Island, suitable nesting habitat can be found at elevations greater than 3,900 feet in crevices or holes in cliff faces and remote lava flows. Like most seabirds, a single egg is laid per season. In Hawai'i, eggs are laid between May and June, and nestlings fledge in October.

46. While probably once common on all the main Hawaiian Islands before the arrival of humans, the Band-rumped Storm-petrel is now significantly reduced in numbers and range. The population on Kaua'i, which likely has the largest population remaining in the state, numbers only an estimated 171 to 221 breeding pairs. Remnant breeding populations likely persist on Maui, Kaho'olawe, Lāna'i and Hawai'i Island.

47. Like the Newell's shearwater and the Hawaiian petrel, the Band-rumped Storm-petrel is vulnerable to fallout from artificial light attraction, and this vulnerability was one of the factors on which the U.S. Fish and Wildlife Service based its decision to list the Hawai'i population of Band-rumped Storm-petrels as endangered in 2016. The very small size and dark coloring of the Band-rumped Storm-petrel means, however, that the bird is almost never recovered when grounded. Consequently, the take of Storm-petrels is not fully represented in SOS data and similar data for Maui County gathered by the Maui Nui Seabird Recovery Project ("MNSRP").

HDOT's Operations "Take" Listed Seabirds

48. Plaintiffs are informed and believe, and on the basis thereof allege, that Newell's shearwaters, Hawaiian petrels and Band-rumped Storm-petrels are attracted to bright lights at Defendant's airport and harbor facilities on Kaua'i, Maui and Lāna'i, circling the lights until the imperiled seabirds fall to the ground from exhaustion or strike HDOT buildings or other structures.

49. According to data compiled by the SOS program and the MNSRP, between 2013 and 2017, bright lights at Defendant's airport and harbor facilities caused the unauthorized take of at least ten Newell's shearwaters on Kaua'i (two shearwaters were recovered from Līhu'e Airport, and eight were recovered from Nāwiliwili Harbor), ten Hawaiian petrels and one Newell's shearwater at Kahului

Airport, six Hawaiian petrels at Kahului Harbor and two Hawaiian petrels at Lānaʻi Airport.

50. The SOS and MNSRP data reflect only the tip of the iceberg with respect to the harm Defendant's operations inflict on the imperiled seabirds. The total take of these species is almost certainly higher because disoriented birds may crash into the nearby ocean or thick vegetation and not be recovered, or are often found dead, in which case they are excluded from the SOS data. Moreover, the small size and dark coloring of the Band-rumped Storm-petrel means that the bird is almost never recovered when grounded. The take of storm-petrels is not, therefore, fully represented in SOS and MNSRP data, even though it is vulnerable to fallout from artificial light attraction.

51. Once Newell's shearwaters, Hawaiian petrels and Band-rumped Storm-petrels are grounded by light attraction, they have very limited ability to resume flight from the ground. Thus, once on the ground, they are vulnerable to predation by dogs, cats and other mammals, as well as to injury and death by vehicles, other human activity or due to dehydration or starvation.

52. Defendant lacks an incidental take permit for the take of listed seabirds associated with its operations. In the absence of a valid incidental take permit, each threatened Newell's shearwater, endangered Hawaiian petrel or

endangered Band-rumped Storm-petrel that is killed, injured or otherwise “taken” by Defendant’s operations constitutes an independent violation of ESA section 9.

53. As the SOS and MNSRP data make clear, Defendant illegally takes listed seabirds each year, and this illegal take has continued into the 2017 nesting season. The lighting fixtures Defendant uses at its airport and harbor facilities are tall, freestanding and exceptionally bright, making them attract threatened and endangered seabirds. Coastal lights like the ones at Defendant’s harbors cause more fallout than inland lights, meaning the harbor lights are particularly dangerous for the seabirds.

54. Defendant is aware of its long-standing non-compliance with the ESA. For several years, Defendant participated with DLNR’s Division of Forestry and Wildlife, the U.S. Fish and Wildlife Service, the County of Kaua‘i and several private entities to develop an island-wide HCP that would minimize the take of the imperiled seabirds from light attraction on Kaua‘i and would offset unavoidable harm by protecting seabird nesting colonies. Plaintiffs are informed and believe, and on the basis thereof allege, that the island-wide HCP process identified Defendant’s facilities on Kaua‘i as one of the largest sources of unauthorized take of imperiled seabirds on the island.

55. On or around October 1, 2016, Defendant unilaterally withdrew from the Kaua‘i island-wide HCP development process. Plaintiffs are informed and

believe, and on the basis thereof allege, that, following receipt of Plaintiffs' notice of intent to sue, Defendant decided to rejoin the HCP process for its airport and harbor operations on Kaua'i. Defendant has yet, however, to secure incidental take permit coverage for any of the ongoing harm its operations on Kaua'i, Maui and Lāna'i inflict on the imperiled seabirds.

56. In the absence of a valid incidental take permit, Defendant has been violating, and continues to violate, the ESA.

CLAIM FOR RELIEF
(VIOLATION OF ESA PROHIBITION ON UNAUTHORIZED TAKE)

57. Plaintiffs reallege and incorporate by this reference the preceding paragraphs of this Complaint.

58. Each year, Defendant's operations "take" threatened Newell's shearwaters, endangered Hawaiian petrels and/or endangered Band-rumped Storm-petrels without incidental take permit coverage. This unauthorized "take" has violated and is violating the ESA. 16 U.S.C. § 1538(a)(1)(B); 50 C.F.R. §§ 17.21, 17.31.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court:

1. Enter a declaratory judgment that Defendant has violated and is violating the Endangered Species Act by taking listed species without incidental take authorization;
2. Issue appropriate injunctive relief;
3. Award Plaintiffs the costs of this litigation, including reasonable attorney's fees; and
4. Provide such other relief as may be just and proper.

DATED: Honolulu, Hawai'i, August 23, 2017.

Respectfully submitted,

/s/ David L. Henkin
DAVID L. HENKIN
Earthjustice
850 Richards Street, Suite 400
Honolulu, HI 96813
Attorneys for Plaintiffs